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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 519

LUTHER THOMAS LAMBERT, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY BRIEF IN OPPOSITION OF APPELLANTS, LUTHER THOMAS LAMBERT, ET AL., TO THE MOTION TO DISMISS OR AFFIRM OF APPELLEE, LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

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1. *Ft. Worth & D. C. Ry. Co., Lease*, 247 I.C.C. 119 — 5
2. *McLean Trucking Co., Inc., et al.*, v. *United States*, (1944) 321 U.S. 67 — 6
3. *New Orleans Passenger Terminal Case*, 267 I.C.C. 763, 282 I.C.C. 271 — 5
4. *New York Central Securities Corp.*, v. *United States*, 287 U. S. 12 — 6
5. *Schwabacher* v. *United States*, 334 U.S. 182 (1948) — 6
6. *United Public Workers* v. *Mitchell*, 330 U. S. 75 — 3
7. U.S. Code, Title 49:
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Appellants, Luther Thomas Lambert, Vernon H. Hedgepath, and the NC&StL Railway Employees Job Protection Association submit this their Reply Brief in Opposition to the Motion to Dismiss or Affirm of Appellee, Louisville and Nashville Railroad Company, the appeal heretofore filed on behalf of appellants and which appeal has now been assigned Docket No. 519.

I

The Appeal Conforms to the Rules of the Court

Paragraph II of the Notice of Appeal filed on behalf of these appellants contains the following statement:

> "These intervening plaintiffs, appellants herein, request that this appeal be joined and consolidated with that which is being filed simultaneously by the plaintiff and appellant City of Nashville, Tennessee, and that a combined transcript of the record in this cause be prepared by the Clerk for transmission to the Clerk of the Supreme Court of the United States, said combined transcript to include the items set forth in the notice of appeal filed by the said City of Nashville. . . . In addition to the above, these appellants request that the Clerk include in the transcript of this cause the following. . . ."

This request was made with the full knowledge and consent of the plaintiff, and appellant, City of Nashville, Tennessee, and none of the appellees objected thereto. A combined transcript was prepared and filed with the Clerk of the Supreme Court, said combined transcript containing certain items specifically designated by appellants herein.

The appellant, City of Nashville, Tennessee, paid the docketing fee and filed its own jurisdictional statement and the case was assigned Docket No. 365. The jurisdictional statement of these appellants was prepared and filed with the Clerk of the Supreme Court on September 23, 1957, within the sixty day period prescribed by Rule 13, and a copy thereof was actually received by appellee, Louisville and Nashville Railroad Company on September 24, 1957 (Footnote 1, p. 1, Motion), also within the sixty day period.

The first indication counsel for these appellants had that the two appeals would not be consolidated under one docket number was receipt of a letter from the Clerk, dated September 26, 1957, received by counsel on September 28, 1957, requesting payment of a docketing fee of $100.00. While it was felt that an additional docketing fee should not be required, a check for that amount was forwarded to the Clerk the same day, and the appeal was docketed by the Clerk on September 30, 1957, under a separate number.

Failure to docket a case within the prescribed time is not jurisdictional and does not deprive the Court of its power to hear the appeal. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 84-86.

II

The Questions Presented Are Substantial.

Before replying to the contentions of appellee that the questions presented are not substantial, we wish to reply to a statement contained in appellee's opening statement concerning the fact that the District Court based its approval of the Commission's order upon an express condition that N. C. & St. L. Employees should be protected equally with L. & N. employees.[1]

Appellee states at page 4 of its Motion as follows:

> " . . . the court, clearly was not, in the language to which appellants here refer, finding any fault with, or undertaking to revise or amend, the Commission's order, but was undertaking merely to make clear and certain that the Court's interpretation was that such order did not *direct* or *authorize* any discrimination

[1] The final order of the District Court does not require or insure equal protection. See pages 18-21, appellants' Jurisdictional Statement.

against N. C. & St. L. employees. . . ." (Emphasis added).

This very point gives rise to one of the principal questions presented by this appeal. Appellants contend that Section 5(2)(c) of the act (Title 49 U.S.C.) requires an *affirmative* arrangement or plan which will adequately protect the interests of the employees affected, and which will *prevent* discrimination, even though such discrimination may not be "directed" or "authorized" by the Commission's order.

Appellants' Question No. 1 Presents a Substantial Question

Appellee does not properly summarize appellants' Question No. 1 in its discussion beginning at page 6 of the Motion. Appellants have not contended that the Commission "ignored the interest of the affected employees". They have said that the Commission ignored their interest *in determining in the first instance* whether or not this particular merger is consistent with the public interest, and that if their interest was considered (which we deny) it was not given proper weight, but was subordinated to the factor involving adequacy of transportation service based on an erroneous interpretation of Section 5(2)(c) of the act, as amended.

Appellants have insisted that the Commission imposed what are alleged to be (but in actuality are not) liberal protective conditions for the employees affected, and then dismissed their interest from *any* consideration in the determination of whether or not the merger is consistent with the public interest, as required by Section 5(2)(c).

At page 7 of the Motion, it is stated that there is no support for appellants' contention that the protective conditions are not in fact liberal. But appellee nowhere

points out or shows wherein the protective conditions imposed are in any way more liberal than those customarily imposed when applied to this case. Furthermore, the Report and Order of the Commission shows on its face that the conditions imposed are the same as those imposed in the *New Orleans Passenger Terminal* Case, 282 I.C.C. 271. In that case, however, there was no proof whatever of earnings in outside industry (page 280). In the instant case there is detailed and uncontradicted evidence showing exactly the loss in dollars and cents which would accrue to dismissed clerical workers in Nashville, for example, in the event they are fortunate enough to procure work of the same general type in Nashville. The loss was shown to be from $18,000.00 to $30,000.00 each (depending upon the position held) from the average age of 49 until the age of retirement, *excluding* the four-year protective period imposed by the Commission's order. (See pages 420-429, 1440-1452, Transcript of Proceedings before the Commission, and pages 30-35, Exceptions of appellant, NC&StL Railway Employees Job Protection Association made Exhibit "f" to appellants' intervening complaint.)

At page 12 of appellee's Motion, it is stated that appellants construe too narrowly the statutory words, "the effect of the proposed transaction upon adequate transportation service," in that appellants rely upon the affirmative finding of the Commission that "it does not appear that the applicants contemplate that any immediate and direct improvement in service will result from the merger." Appellants' position is supported by the Commission's decision in *Fort Worth & Denver City Ry. Co., Lease*, 247 I.C.C. 119 (1941), and many others (discussed in appellants' Jurisdictional Statement, pages 10-13). While appellee attempts to belittle the *Fort Worth* decision, it has never been overruled.

At pages 18-20 of its Motion, appellee cites *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, *McLean Trucking Company, Inc., et al,* v. *United States* (1944) 321 U.S. 67, and *Schwabacher* v. *United States*, 334 U.S. 182, as authority for its contention that "adequacy of transportation service" is the *primary* consideration by which the Commission should be guided in cases of this kind. In those cases, the interest of the employees was not at issue, and in the absence of that issue, "adequacy of transportation service" may become the primary guide or standard.

Appellants' Question No. 2 Presents a Substantial Question

In discussing appellants' Question No. 2, appellee asserts that the question presented is not substantial; that appellants have taken an inconsistent position; and, that they have included a question not listed in their notice of appeal.

The question presented is substantial because it goes to the very heart of Section 5(2)(f) of the act which provides that as a condition of approval the Commission's order shall provide a fair and equitable arrangement to protect the interests of the employees involved. The question presented challenges the arrangement provided in the Commission's order. The second part of the question is substantial because if the District Court may not revise or amend the Commission's order, then it is void.

As for the charge that appellants have taken an inconsistent position relative to whether or not the District Court has, by its *final order*, actually in effect revised or amended the Commission's order, it is submitted that when the entire document to which appellee refers is considered, there is no inconsistency. Furthermore, the authority and comments set out at page 24 of appellants' jurisdictional

statement in this regard were lifted almost verbatim from the Memorandum on Behalf of the United States and the Interstate Commerce Commission with Respect to the Form of Judgment and the Plaintiff's Application for a Stay Pending Appeal (page 5) submitted to the District Court.

Appellee charges (page 21, Motion) that appellants have erroneously represented the testimony of applicants' witnesses to the effect that all dismissals and transfers would come exclusively from employees of the N. C. & St. L. Railway, rather than from both railroads. This has been the position of the appellant, NC&StL Railway Employees Job Protection Association, throughout the proceedings before the Commission and before the Court. (See page 8, Brief to Examiner, and page 30, Exceptions to the Examiner's Proposed Report, filed on behalf of the employee association, being Exhibits "d" and "f" to appellants' intervening complaint.) Appellants' contention in this regard was not controverted by appellee in its Reply to Exceptions, or in its brief to the District Court, submitted prior to the hearing before that Court.

In support of its contention that there is no testimony to the effect that all dismissals will come exclusively from the NC&St.L, appellee cites a portion of the cross examination of witness Tilford (Page 22, Motion). The next two questions and answers which follow appellee's quotation are pertinent:

> "Q. Let us take the traffic department. L. & N. has 14 employees and N. C. & St. L. has 81 (at Nashville). You expect to reduce that to 32?
>
> "A. Yes.
>
> "Q. Can you give any information as to how many of the 81 will be retained and how many of the 14 will be retained?
>
> "A. I imagine the whole 14 would be retained, and

the dismissal(s) will come out of the N. C. & St. L. group." (Parenthetical expression and emphasis added).

Witness Tilford also testified on direct examination as follows:

"... that the net change at Nashville and Davidson County, or *net loss in number of employees*, would be 669.

On the system, the total positions that we expect will be eliminated—NC&StL system—is 550. Then there will be transferred from their present place of employment approximately 289." (Transcript of testimony before the Commission, pages 33-34) (Emphasis added)

And on cross-examination he further stated:

"Q. Your 289 figure, was that derived from an estimate of new jobs that would be created at Louisville, then?

"A. There will be jobs that would be created at Louisville, to which we would transfer these employees that were agreeable to be transferred." (Page 263, Transcript of testimony before the Commission)

Thus, the record does show that all transfers and dismissals will come from the NC&StL alone—there is not one word in the entire transcript of the proceedings before the Commission to show that *any* employees of the L. & N. will be transferred, dismissed, or displaced as a result of the merger!

Appellee charges (page 23, Motion) that appellants have raised a question not included in their notice of

appeal relative to the failure of the Commission to find that the adverse effect on the employees affected would be permanent or to find the extent of the admitted adverse upon them. Whether or not the admitted adverse effect upon the employees will be permanent or temporary, and the extent of the adverse effect in dollars and cents, where such was shown by uncontradicted proof, has a direct relation to the question presented concerning whether or not the protective conditions imposed by the Commission are adequate and comply with the requirements of Section 5(2)(f) of the act.

Rule 10, Par. 2(c) of the Court's rules, specifically provides that questions presented shall not be repetitious and that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

Concerning the adverse affect upon the employees, the Commission found at Sheet 64 of its Report, as follows:

> "A general employee survey of the Nashville labor market, made in May 1955, disclosed that the prevailing wage level for the Tennessee Company clerical workers was much higher than that paid for similar work in other Nashville industries; that for most firms hiring clerical workers the age range insisted upon was between 18 and 30 years; and that, except for railroad employees workers at Nashville were not unionized. The average age of clerks in the employ of the Tennessee Company at Nashville is over 49 years and the average length of service with the railroad is almost 24 years. The averages for the various other classes of employees are about the same, or slightly higher, than for the clerks."

The Commission failed to consider other uncontradicted proof showing how much more the clerical workers of the Tennessee company are paid for similar work than is paid by other Nashville industries for similar work; that the differential has existed for many, many years; and, that there is no reasonable basis to conclude that this spread or difference in wages would ever be diminished or eliminated in the future. The testimony of the expert witness presented by the employees is to the effect that this spread or difference would be permanent. This testimony was not rebutted in any way.

Appellants' Question No. 3 Presents a Substantial Question

The certified copy of the transcript of the proceedings before the Commission was procured by appellant City of Nashville. These appellants had no knowledge of the fact that the certified copy of the transcript as furnished by the Secretary of the Commission was incomplete. That fact was learned quite by accident. When it was ascertained, counsel for these appellants promptly wrote the Secretary of the Commission requesting that he correct his erroneous certification, and copies of the omitted documents were submitted to the District Court by a proper amendment to their intervening complaint. The corrected certification containing the statement, "the originals of which are *now* on file and of record in the office of said Commission," was not received until after the case had been argued before the District Court, although it was promptly filed with the Court.

The question involved goes to whether or not the *Commission* had all the material exhibits before it when deciding the case and whether or not the District Court may sustain an order of the Commission in such an event.

The exhibits referred to were filed after the hearing before the Commission pursuant to instructions from the Hearing Examiner.

Respectfully submitted,

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